IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF GEORGIA,	)	
	)	
Plaintiff,	)	Civil Action
	)	No. 1:01 CV 02111 (EGS HTE LFO)
v.	)	
	)	3-Judge Court
JOHN ASHCROFT, et. al.,	)	
	)	
Defendants.	)	
	)	

UNITED STATES' REPLY TO GEORGIA'S
RESPONSE TO ORDER TO SHOW CAUSE

I. INTRODUCTION

By Order of August 20, this Court ordered the Defendants to show cause why judgment should not be entered for Georgia. On September 19, the United States and Intervenors filed their responses that Georgia has not met its burden under Section 5 of demonstrating its proposed plan is not retrogressive as defined by the Supreme Court in Georgia v. Ashcroft, 539 U.S. __, 123 S. Ct. 2498 (2003) based upon the existing record in this case, and that the Court should reopen discovery to produce a full evidentiary record pertinent to the revised standard of retrogression. On October 14, Georgia filed its brief arguing that judgment should be entered for Plaintiff. This reply brief responds to Georgia's contentions and reiterates that Georgia has not met its Section 5 burden and that further evidentiary proceedings are appropriate.

In its decision, the Supreme Court upheld this Court's finding that the 2001 proposed plan causes a retrogression in the ability of minority voters to elect candidates of their choice in Senate Districts 2, 12, and 26. Id. at 2514-15. This is the starting point of the analysis on

remand. To satisfy its burden, therefore, Georgia must establish that the proposed plan: (1) creates offsetting districts where minority voting strength has increased enough so that minority voters have an ability to elect candidates of their choice; or (2) creates a "greater" number of districts where minority voters can enter into coalitions to elect their preferred candidates, influence elections to provide the margin of victory for candidates "sympathetic to the interests of minority voters," or otherwise exert enhanced legislative influence through their preferred candidates. Id. at 2511-13.[1]

There are several points to note at the outset. First, Georgia acknowledges, as it must, that it is required to demonstrate offsetting gains in black voting strength to compensate for the retrogression in Districts 2, 12 and 26. Georgia's Resp. at 6-7.

Second, because the record in this case concerning districts other than 2, 12 and 26 is very limited, Georgia has couched its case primarily in terms of bare population statistics to meet its burden. Georgia relies on counts of the number of districts in the 1997 benchmark plan and the 2001 proposed plan within two population categories: those over 50 percent BVAP, and those

[1] Georgia points to language in the Supreme Court's opinion in which the retrogression in Districts 2, 12, and 26 is described as "marginal." Georgia's Resp. at 6. But, however the Court's finding with respect to these districts is characterized, the decision clearly upholds this Court's holding that retrogressive reductions in black voting strength occurred in three districts which the Supreme Court described as "ability to elect" districts. In discussing such districts the Court holds that "the ability of a minority group to elect a candidate of choice remains an integral feature" of the Section 5 analysis, 123 S. Ct. at 2513-14, a point that Georgia disregards. Moreover, Georgia's claim about Dr. Engstrom's testimony regarding these districts is incomplete and misleading. Dr. Engstrom did testify that black statewide candidates have prevailed in the precincts within proposed Districts 2, 12, and 26, but he also made the point that racial voting patterns differ in statewide and local senate races. U.S. Ex. 601 at 12. This Court agreed. Georgia v. Ashcroft, 195 F. Supp.2d 25, 85-86, 94. See also Ashcroft, 123 S. Ct. at 2525-26 (Souter, J., dissenting).

between 30 and 49.99 percent BVAP.[2] The State also presents the same types of counts based upon the black total populations of the districts. See Georgia's Resp. at 7-8.[3] The record concerning the districts below 50 percent BVAP is almost exclusively statistical, and while such statistical data and comparisons groupings provide a starting point for the Court's analysis, much more is required.[4] Now that influence districts have become relevant to the retrogression inquiry, the Court should apply a functional analytical approach to identifying influence districts in the benchmark and proposed plans, just as it does when identifying those districts in which minority voters can elect candidates of their choice in the benchmark and proposed plans.

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[2] Georgia provides a table for districts between 40 and 49.99 percent BVAP, but lumps these together with the districts between 30 and 39.99 percent BVAP in its discussion.

[3] While we agree that a statistical comparison of district populations is relevant to the Court's inquiry here, Georgia's criticism of the United States' side-by-side ordinal comparisons of the benchmark and proposed plan in Attachments A and B of the United States' Response to the Order to Show Cause ("U.S. Resp."), on the grounds that they compare "unrelated districts", is wholly misplaced. Georgia's Resp. at 13. Such comparisons plainly are appropriate when comparing two plans as a whole, because decreases in minority voting strength in one district may be offset be increases in another, "unrelated" district. Indeed, Georgia's tables at pp. 7-8 reflect just such sets of "unrelated" districts, only aggregated into categories, making no attempt to account for changes to individual districts within or between the categories.

[4] In its brief, Georgia assumes that any district with a BVAP greater than 50 percent provides black voters with an ability to elect candidates of their choice without providing district-specific evidence in support. Similarly, Georgia assumes that any district between 30 and 49.99 percent would enable black voters to influence election outcomes. However, there is no way of knowing in the abstract whether black voters in a particular 50 percent BVAP district have an ability to elect candidates of their choice without looking at district-specific factors, such as the degree to which voting in the area is polarized by race. Similarly, based on the demographic numbers alone, one cannot determine whether increasing a district, for example, from 28.5 to 31.5 percent BVAP would provide black voters any greater influence, if any influence at all. Nonetheless, Georgia would present this hypothetical as a new influence district. As Justice Souter recognized in dissent in Ashcroft, "percentages tell us nothing in isolation, and that without contextual evidence the raw facts about population levels fail to get close to indicating that the State carried its burden to show no retrogression." 123 S. Ct. at 2525.

II. THE EXISTING RECORD PRECLUDES ENTRY OF JUDGMENT FOR GEORGIA

A. Georgia's Population Data Do Not Prove the Creation of New Districts to Offset the Retrogression in Districts 2, 12 and 26 of Its Proposed Plan

We start with the population data on which Georgia places the weight of its argument. As discussed below, the 2000 Census BVAP data have the greatest weight in this case, and they show that the number of senate districts in which the BVAP is 50 percent or more increases from 12 in the benchmark plan to 13 in the proposed plan. The number of senate districts in which the BVAP ranges between 30 and 49.9 percent also increases from 11 in the benchmark plan to 13 in the proposed plan, which appears to be the sole basis for Georgia's repeated claim to have "substantially" increased the number of influence districts in the 2001 Plan compared to the benchmark. Georgia's Resp. at 8. However, there is no evidence in the record showing that these changes offset the plan's retrogression and, in fact, the available evidence shows the contrary.

With regard to the number of districts with BVAP majorities, Georgia merely repeats its previous attempt to cast proposed District 34 as providing a net increase in black voting strength. It does not. Among the 13 districts in the proposed plan with BVAP majorities, only District 34 did not already have a BVAP majority in the benchmark plan.[5] However, District 44 of the benchmark plan has a 49.6 percent BVAP, and as the United States noted previously, a substantial portion of the black population in benchmark District 44 was swapped into proposed District 34. As a result, the BVAP in District 44 decreases from 49.6 percent in the benchmark

[5] It bears repeating that the BVAP percentage in each of those other 12 districts is decreased by at least 4 percentage points by the proposed plan, and that three of those 12 districts are ones which this Court found to be retrogressive.

plan to 34.7 percent in the proposed plan, while the BVAP in District 34 increases from 34 percent in the benchmark plan to 50.5 percent in the proposed plan. This nearly mirror-image exchange of population results in a net wash in terms of black voting strength, and it accounts entirely for the increase from 12 BVAP majority districts in the benchmark plan to 13 in the proposed plan. Therefore, the increase in the number of majority-BVAP districts from 12 to 13 is not significant.

Furthermore, Georgia assumes that any district with a BVAP greater than 50 percent provides black voters with an ability to elect candidates of choice. As we noted in the U.S. Resp. at pp. 16-18, the results of the 2002 election cast this assumption into question. If permitted to supplement the record, the United States would show that in Senate District 22, Charles Walker, the black former majority leader recognized in past elections as a black-preferred candidate, was narrowly defeated in 2002 by a white Republican candidate.[6] Under the benchmark plan, District 22 has a BVAP of 63.5 percent, which is reduced to 51.5 percent in the proposed plan. To the extent that the election of black candidates provides a measure of "descriptive representation", the Court will also be made aware, if the record is reopened, that the 2002 general election resulted in the election of ten black state senators, as compared to eleven under the benchmark plan, as a result of Senator Walker's defeat.[7]

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[6] Because District 22 of the Interim Plan under which the 2002 election was conducted is identical to District 22 of the Proposed Plan, there is no evidence in the record that a different outcome would have resulted if the Proposed Plan had been used instead.

[7] If Georgia's equation of the ability to elect a Democratic senator with political influence is accepted, then the election of a white Republican in District 22 -- who will have the advantage of incumbency in future elections -- raises the question of whether District 22 should be counted as even an influence district.

In light of Georgia's inability to show any significant increases to black voting strength in districts over 50 percent BVAP, Georgia must show a net increase in influence districts as the means of offsetting the retrogression in Districts 2, 12 and 26. The present record does not permit such a showing. The following table summarizes the population data and election outcomes in the districts which Georgia contends are influence districts:[8]

Table 1: Districts With 30-39.99 Percent BVAP in 2000

District	Proposed BVAP%	Interim BVAP%	Benchmark BVAP%	2000 Incumbent	2002 Elected Representative
23	38.15	38.15	33.42	White Democrat	White Republican*
25	37.80	37.75	36.12	White Democrat	White Democrat
41	37.65	37.65	16.79	White Republican	White Democrat
29	36.50	36.86	32.63	White Democrat	White Republican*
14	35.82	36.69	41.62	White Democrat	White Democrat
44	34.71	34.71	49.62	White Democrat	White Democrat
8	34.65	34.65	30.44	White Democrat	White Democrat
16	33.90	11.52	19.97	White Republican	White Republican
3	33.73	33.73	37.34	White Democrat	White Democrat
20	33.06	32.64	35.12	White Democrat	White Democrat
33	31.98	31.98	33.59	White Democrat	White Democrat
11	31.69	30.32	38.08	White Democrat	White Republican
4	30.51	25.85	26.61	White Democrat	White Republican*
Totals:	13	11	10	11 Democrats	8 Democrats

***** Districts that elected Democrats who switched parties after the 2002 election

Georgia argues that the increase in the number of districts with BVAP percentages

[8] Georgia does not attempt to argue that any District below 30 percent BVAP is an influence district.

between 30 and 49.9 percent from 11 under the benchmark plan to 13 under the proposed plan means that "new" influence districts have been created. Even if Georgia is correct that it has created additional influence districts, Georgia has laid out no rationale as to how two or even three influence districts can possibly offset the established retrogression in the ability to elect candidates of choice in three other districts. It is true that the Supreme Court has not specified how the Court is to balance increases in influence against decreases in the ability to elect candidates of choice. However, the Court's reasoning indicates that, in order to offset retrogression in the ability to elect candidates of choice, the number of newly-created influence districts must exceed the number of such retrogressive districts in order to avoid retrogression in the plan as a whole.[9] Therefore, a district in which black voters have the ability to elect candidates of choice is worth more in this analysis than a district in which black voters can merely exert influence. Thus, even taking Georgia's claims on their face, Georgia has failed to meet its burden of proof.

Moreover, a closer examination of the population data shows that additional influence in the plan as a whole is minimal, if it exists at all. Georgia does not identify the specific districts which it contends are "new" influence districts, nor has it introduced any evidence regarding the specific characteristics of racially polarized voting in any of these unidentified geographic regions of the state. At first glance, the new districts might appear to be District 41, which

[9] The Court explicitly stated that a greater number of "coalition districts" would be required to offset retrogression in the ability to elect candidates of choice. "Alternatively, a State may choose to create a greater number of districts in which it is likely -- although perhaps not quite as likely as under the benchmark plan -- that minority voters will be able to elect candidates of their choice." 123 S. Ct. at 2511 (emphasis added). Similarly, the number of new influence districts (which, unlike coalition districts, by definition do not provide the ability to elect candidates of choice) must exceed the number of retrogressive ability-to-elect districts.

increases from 16.8 percent BVAP in the benchmark to 37.7 percent BVAP in the proposed plan, and District 16, which increases from 20 percent BVAP in the benchmark to 33.9 percent BVAP in the proposed plan. However, as the United States noted in its opening brief, these two districts have nearly identical corresponding districts in the benchmark plan.[10] In the context of the plan as a whole, the increases within Districts 41 and 16 do not create "new" influence districts. Equivalent districts already are present, at least when measured only by their BVAP percentages.

Districts 33, 11, and 4 are the 24th through 26th most heavily-black districts in the proposed plan, and have BVAPs of 32, 31.7 and 30.5 percent, respectively.[11] The corresponding districts in the benchmark plan (Districts 13, 4, and 19) have BVAPs of 28.7, 26.6, and 24.4 percent, respectively. Therefore, in terms of the proposed plan as whole, the increase of three in the number of districts with BVAPs of 30 percent or more is best understood as representing only slight increases in the BVAP percentages of the 24th through 26th most heavily-black districts.[12] The State has provided no evidence that black voters have significantly more influence in a district with a 31.7 percent BVAP than they do in a district with a 26.6 percent BVAP, as is the case between District 11 in the proposed plan and the corresponding district (District 4) in the benchmark plan.

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[10] District 41 is the 16th most heavily-black district in the proposed plan, while in the benchmark plan the 16th most heavily-black district (District 3) has a BVAP of 37.3 percent. Similarly, District 16 is the 21st most heavily-black district in the proposed plan, while in the benchmark plan the 21st most heavily-black district (District 23) has a BVAP of 33.4 percent.

[11] For each of the districts in the proposed plan with BVAPs above 32 percent the corresponding district in the benchmark plan also has a BVAP above 30 percent.

[12] The 30 to 49.9 percent category lost one member because of the shift in population between District 44 in the benchmark and District 34 in the proposed plan.

Additionally, it should be noted that District 14, which was 41.6 percent BVAP in the benchmark plan, is reduced to 35.8 percent BVAP in the proposed plan. Georgia makes no attempt to explain why this reduction would not be retrogressive, either within the category of influence districts, or as the loss of a potential coalition district in which black voters could join with white voters to elect a candidate of choice.

B. Election Data Do Not Show that New Districts Offset the Retrogression in Districts 2, 12 and 26 of Its Proposed Plan

Georgia's arguments based upon other statistical evidence in the record are similarly flawed. For example, Georgia repeats that 90 percent of black voters in Georgia vote for Democratic candidates, Georgia's Resp. at 9, a fact which the United States has not disputed. Georgia then points out that 33 of 34 Senate districts in the proposed plan where the Democratic Performance number was at least 50 percent had at least a 20 percent BVAP. Id. As the United States noted in its opening brief, were the Court to permit additional evidence, the United States would show that the Democratic Performance estimates proved in the 2002 election to be a poor indicator of electoral outcomes. As a result of election-day losses by Democrats and defections by winning white Democratic candidates, over half of the districts with Democratic Performance indexes between 50 and 55 percent are now represented by white Republicans; under Georgia's theory that Democratic representation equates with black political influence, black voters would have little or no influence if they are represented by white Republicans.

Georgia's attempt to rely merely upon its database of generalized election outcomes is incomplete and unpersuasive. Georgia's argument is based upon election data used by the State's expert to identify districts in which black voters had elected candidates of choice.

However, the database reflected no effort, nor did it contain the information needed, to identify the analytically distinct influence districts the Supreme Court now has made relevant. Furthermore, Georgia's citation of election results showing that black candidates were elected in a handful of districts between 30 and 41 percent BVAP -- for which Georgia presented no racially polarized voting evidence -- is not tied in any way to the creation of any specific new influence districts. Georgia provides no evidence that the voting in any of the elections it cites had any overlap with the new influence districts it claims to have created.

Georgia cites the election of black candidates in two of six "open seat" legislative elections in districts with BVAPs ranging from 33 to 39.9 percent to demonstrate that districts falling within this range afford black voters influence. Georgia's Resp. at 9. Apart from showing that black candidates were usually defeated in districts in this BVAP range, these elections do nothing to show that Georgia has created new influence districts. See Georgia's Ex. 25, App. 2.[13]

[13] The only Senate elections in this range were the 1998 District 25 and 1992 District 29 elections, in which the candidate of choice of black voters in both was defeated. Based on the current record, neither of these districts appear to be offset districts, for they elected Democrats under the benchmark plan and their numbers did not change appreciably from the benchmark to proposed plans. District 25 goes from 36.12 percent in BVAP to 37.80 percent in BVAP, while District 29 goes from 32.63 percent in BVAP to 36.50 percent. The four other elections in this range cited by Georgia were the 1996 Fourth Congressional District election, the 1992 State House District 89 contest, and the 1996 State House District 160 general and special elections. As has been pointed out before, Georgia's characterization of the 1996 Fourth Congressional contest as an "open seat" election is highly dubious. Cynthia McKinney, the black incumbent elected for the first time in 1992, and reelected in 1994, prevailed as the incumbent in a newly-drawn district. Trial Trans., Feb. 4, 2002, Afternoon sess., 61:1-63:10. A black candidate preferred by black voters prevailed in the 1992 House District 89 contest. The election of black candidates in the metro Atlanta area (4th Congressional) and in the Athens area (House District 89) where white crossover support for black candidates is atypically strong, however, demonstrates little about how other districts in other parts of the state would perform at similar BVAP levels. Former House District 160 sat where current Senate District 11 sits, which is identical under the benchmark, proposed, and interim plans. An expanded record would show that Senate District 11 elected a Republican in 2002, so though it has a BVAP between 30 and

As discussed above, the only possible net increase in purported influence districts was in the range between 30 and 32 percent BVAP.

Although Georgia cites Senate District 25 as a district where a black challenger won in 1994 at 41 percent BVAP and then won reelection post-Miller in 1996 at 36.66 percent BVAP, Georgia's Resp. at 9, Georgia fails to mention that in 2000, a white incumbent in District 25 defeated that same black candidate, who ran in 2000 as a challenger to regain the seat he gave up to run unsuccessfully for Lieutenant Governor in 1998. U.S. Amended Proposed FOF, Feb. 21, 2002, p. 230, item 459A. More to the point, however, Georgia does not argue that District 25 is a newly-created influence district, nor can it. District 25 has a 36.1 percent BVAP in the benchmark plan and a 37.8 percent BVAP in the proposed plan, and so it simply does not count toward meeting Georgia's burden of showing the creation of new influence districts.

Georgia also argues that "[i]n the 16 legislative elections between 1991-2001 where the BVAP was between 35% and 47%, the African American incumbent won every time. In addition, eight African Americans have been elected to statewide office in Georgia even though BVAP statewide is only 26.6%" (internal citations omitted). Georgia's Resp. 9-10. Without more information about these 16 elections – whether they were Senate elections, or elections in other types of districts, the geographic location of the districts where these elections were held, the degree to which voting is polarized by race in those districts, etc. – this summary information is of little assistance in determining whether Georgia has met its burden. As for the success of statewide black candidates, this Court has recognized the finding of the United States's expert

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39.99 percent, Georgia cannot credibly claim it as an influence district – certainly not a newly-created one given that it dropped from 38 percent BVAP under the benchmark to just under 32 percent BVAP under the proposed.

"that African American candidates consistently received less crossover voting in local election than in statewide elections." Ashcroft, 195 F. Supp. 2d at 85-86, 94.

In sum, Georgia has not shown that any of the district elections it cites involved areas of the state in which it claims to have created a new influence district. Accordingly, these elections are of no value to Georgia in meeting its burden to identify offsetting gains for black voters. None of the evidence presented by Georgia, including the demographic data, demonstrates that black voters will be able to influence elections in specified districts. Georgia does not even identify the districts it tallies as influence districts let alone demonstrate that black voters can be expected to influence who gets elected in those districts.

C. The Election of Democrats, by Itself, Does Not Necessarily Demonstrate Black Voters' Influence

Georgia's discussion of population data and election outcomes has little relation to its justification for retrogression, which appears to be a theory that the election of Democrats can serve as a proxy for the influence of black voters in Georgia. Looked at in these terms, only in Districts 41 and 16 could Georgia even arguably have created new influence districts, because those districts had elected Republicans under the benchmark plan. See Table 1 above. All of the other districts between 30 and 49.9 percent BVAP already had elected Democrats under the benchmark. Reelection of a Democrat would, under Georgia's theory, only maintain, not enhance, the existing level of black voter influence.[14] Under Georgia's theory, the reelection of

[14] From the beginning of this case, Georgia has stressed that its goal in drawing the 2001 redistricting plan was to preserve or increase the number of majority-minority districts while also strengthening the Democrats control in the Senate, thereby increasing the influence of black voters. As noted by the Supreme Court:

The plan as designed by Senator [Robert] Brown's committee kept to the dual

Democrats would represent a maintenance of the status quo, not the creation of new influence. Moreover, under this theory, there appears to have been a loss of influence for black voters in District 11, where Democrats lost a seat to a Republican.

Georgia wants the Court to ignore the fact that four senators, elected as Democrats in 2002, immediately after that election, switched their affiliation to the Republican Party.[15] Georgia's position reflects a belief that the mere election of a Democrat is sufficient to meet its burden, regardless of what positions that representative may take after being elected to office. However, Georgia's position on this point is untenable on its face. Georgia cannot realistically claim that it has successfully created new influence districts for black voters in districts where the elected white Democrats felt sufficiently safe to switch to the Republican Party without fearing any repercussions from black voters. Such a calculation by these senators would be compelling evidence that they perceived black voters, who overwhelmingly support Democratic candidates, as unnecessary to their continued incumbency.

D. The United States Has Not Argued That Section 5 Requires Jurisdictions to "Pack" Black Voters

Georgia mistakenly argues that the United States misapplied the Supreme Court's opinion. Georgia's Resp. at 10-13. First, Georgia misconstrues the United States' identification

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> goals of maintaining at least as many majority-minority districts while also attempting to increase Democratic strength in the Senate. Part of the Democrat's strategy was not only to maintain the number of majority-minority districts, but to increase the number of so-called "influence" districts, where black voters would be able to exert a significant - if not decisive - force on the election process.

Ashcroft, 123 S. Ct. at 2506.

[15] Districts 4, 13, 23, and 29 reelected Democrats in 2002, who then switched their party affiliation to Republican after the election.

of the across-the-board cuts in the most heavily black districts as arguing for "packing" districts with black voters to create "safe" districts. Id. at 10. The United States' brief merely made the point that Georgia could not hope to find offsetting increases for the retrogression in Districts 2, 12 and 26 among the existing majority-black districts, in all of which the BVAP had been substantially reduced. In fact, the United States' objections to the 2001 plan were narrowly -- perhaps too narrowly in light of the outcome in District 22 -- restricted to three senate districts, while Georgia had made across-the-board reductions in the BVAP percentage of all majority-black districts. Moreover, the United States did not object to preclearance of the 2002 interim plan, even though each of those districts was redrawn at less than its benchmark BVAP level. That position hardly constitutes advocating "packing."

E. In this Case, the 2000 Census Data Is More Probative than the 1990 Data

Georgia cites the Supreme Court's opinion in Ashcroft for the proposition that when comparing the benchmark and proposed plans, the benchmark should be evaluated with the census numbers in effect at the time the benchmark plan was enacted and argues that the United States ignores this instruction. Georgia's Resp. at 11. Georgia argues that the benchmark plan should be evaluated with the 1990 numbers, especially given the substantial population deviations in the benchmark plan by 2000. Id. Georgia's argument that the 1990 census data is more relevant is misplaced. The benchmark plan was adopted in 1997, within three years of the 2000 Census, as opposed to seven years after the 1990 Census. The benchmark plan almost certainly was malapportioned vis-a-vis the 1990 numbers when it was adopted in 1997. Unless Georgia can demonstrate that the bulk of the deviation occurred between 1997 and 2000, which it would be hard-pressed to do, the 2000 numbers will clearly be more reflective of conditions in

1997 when the benchmark plan was drawn.[16]

F. The Current Record and the 2002 Election Results Show That the Proposed Plan Would Diminish Black Legislative Influence

Georgia also argues that evidence in the record supports it on another new factor that the Supreme Court held must be considered in the retrogression inquiry – the extent to which the proposed redistricting plan would protect the "comparative position[s] of legislative leadership, influence, and power" for minority-preferred incumbents and "whether the representatives elected from the very districts created and protected by the Voting Rights Act support the new districting plan." Ashcroft, 123 S. Ct. at 2513. According to Georgia, evidence in the record shows that the 2001 plan "maintains or increases minority opportunities to participate in the political process by making it more likely that senators who represent majority-minority districts will maintain positions of legislative influence." Georgia's Resp. at 16. In addition, Georgia contends that the United States inconsistently disputed that the interests of minority voters are furthered by the election of Democrats while noting that defections of Democrats to the Republican Party caused the loss of leadership positions by black senators. Id.

Georgia may not meet its burden merely by showing that it hoped to avoid retrogression; it must show that its proposed plan will actually avoid retrogression. Thus, Georgia's premise

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[16] While the Court notes that a comparison with the benchmark plan using the 1990 Census data is required, the decision does not indicate what comparative weight should be given to the two comparisons, and this is an issue that this court will need to consider on remand. Since the benchmark plan was passed in 1997, it seems clear that a comparison using 2000 data is entitled to considerably more weight than one using the 1990 data. More generally, the United States believes that the 2000 data are entitled to greater weight because the fundamental purpose of Section 5 is to protect the status quo by determining whether the proposed plan would be retrogressive at the present time. City of Rome v. U.S., 446 U.S. 156, 186 n.22 (1980) ("Current voting-age population data are probative because they indicate the electoral potential of the minority community."); See also Ashcroft, 123 S. Ct. at 2525 (Souter, J., dissenting).

that it is enough to show that the proposed plan would "mak[e] it more likely that senators who represent majority-minority districts [would] maintain positions of legislative influence" is off base. Id. (emphasis added). See Ashcroft, 123 S. Ct. at 2513 ("Maintaining or increasing legislative positions of power for minority voters' candidates of choice, while not dispositive by itself, can show lack of retrogressive effect under § 5."). The Court's ability to examine this issue fully is now enhanced because of the results of the more recent 2002 elections. Were the Court to accept the results of the 2002 elections into the record, the United States would demonstrate that the Democratic Party lost majority-control of the Senate and thus black senators lost leadership positions following elections conducted under a plan very similar to Georgia's proposed plan.[17]

As for the purported inconsistent statements, Georgia misstates the United States' position. Georgia's Resp. at 16-17. The United States disputes only that "the interests of minority voters are limited to the election of Democratic candidates." U.S. Resp. at 13. First of all, just because a particular senator is a Democrat does not mean that he or she will be sympathetic to the concerns of minority constituents, especially if voting was racially polarized such that black voters were not integral to the senator's election.[18] Though the election of Democrats would tend to help safeguard Democratic control of the State Senate, as the defection of persons elected as Democrats to the Republican side demonstrates, electing Democrats does

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[17] The 2002 interim plan is identical to the 2001 proposed plan in 29 of the 56 districts and nearly identical in terms of the BVAP percentage in sixteen other districts.

[18] For example, given the chance to present additional evidence, the United States would show that twelve of thirty senators from districts with more than 25 percent BVAP, four of them Democrats, voted in 2003 against the unanimous wishes of the Senate Black Caucus on changing the Georgia State flag.

not necessarily protect black leadership positions.

III. THE COURT SHOULD REOPEN THE RECORD IN THIS CASE

In light of the above state of the record, it would appear to be in Georgia's best interests to agree to reopen discovery. On the current record, Georgia has failed to identify compensatory gains for black voters to offset the established retrogression in Districts 2, 12, and 26. Yet, Georgia seizes upon the Supreme Court's instruction to "reweigh" and argues that the Court should not reopen the record. Georgia's Resp. at 5-6, 18-19. The Supreme Court's order does not prohibit this Court from reopening the record, but rather leaves the decision to the Court's equitable discretion.[19]

The United States submits that the equities involved favor the Court exercising its discretion to reopen the record. As noted in the United States' initial brief, the Supreme Court significantly expanded the scope of facts necessary to determine whether retrogression has occurred. Because the parties limited their evidence at trial to the three districts at issue and geared their evidence to the standard then in place, much potential evidence was never introduced to or considered by this Court. Additionally, factual information, specifically the outcome of the 2002 elections, has come into existence since this Court's 2002 decision. Finally, unlike when the case was tried in 2002, the state has a constitutional plan in place. Thus, there is no risk that next year's senate elections will approach with an unconstitutional plan in place, as was the case during the first trial in this matter. Therefore, there is more time to ensure that the record is fully developed and the case conclusively decided.

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[19] Contrary to Georgia's assertions, the United States does not argue that this Court is "mandated to reopen the record for further discovery and evidentiary proceedings." Georgia's Resp. at 5.

The cases Georgia cites in arguing that the Court should not reopen the record are inapposite. While conceding that "[a] motion to reopen the record to submit additional evidence is usually within the discretion of the district court," see Georgia's Resp. at 5, Georgia suggests that Casey v. Planned Parenthood of S.E. Penn., 14 F.3d 848 (3rd Cir. 1994), requires the Court to keep the record closed. Georgia cites Casey for the proposition that "a change of controlling law made and applied by the appellate court in the same case is not an intervening change of law that will justify the trial court's reopening the record absent direction from the appellate court to do so." Georgia's Resp. at 5 (emphasis in original). However, in Casey, the Supreme Court both changed the controlling law and applied it. 14 F.3d at 857. Casey falls under the category of cases where the Supreme Court adopts a new legal standard and applies it itself rather than, as in Ashcroft, remanding the case for the courts below to apply the new standard in the first instance. Id. Similarly, Ramsey v. United Mine Workers, 481 F.2d 742 (6th Cir. 197), does not mandate keeping the record sealed. In Ramsey, the Supreme Court changed the level of proof for determining whether defendants were guilty of a conspiracy from "clear proof" to "preponderance of the evidence." Id. at 743. Changing the threshold level of proof is wholly unlike changing the substantive standard by which retrogression is analyzed, because the Ramsey court simply had to decide if the violation was present based on a lower standard and existing facts. Here, the record is blank in the substantive areas Ashcroft made relevant to the Section 5 inquiry.

Finally, Georgia argues that permitting consideration of the 2002 elections would render the Section 5 inquiry too open-ended and that the focus should necessarily be on the information available to legislators when the plan was enacted. Georgia's Resp. at 18-19. The United States

does not reopen Section 5 administrative decisions, after preclearance has been granted, to determine how redistricting plans perform in subsequent elections. However, the 2001 proposed plan has never been precleared. Since the effect of the redistricting plan is a vital factor, the United States and this Court are not required to pretend that the 2002 elections did not occur and ignore the results when analyzing the impact of a proposed redistricting plan.[20]

IV. CONCLUSION

In summary, Georgia has failed to meet its burden on the basis of the existing record. What evidence that does exist relies too heavily on demographic data rather than a factual basis for determining how a particular district might be expected to perform, and whether black voters will be able to exert control or influence over electoral outcomes. Georgia has simply failed to demonstrate gains for black voters under Georgia's proposed plan that would offset established retrogression in Districts 2, 12, and 26. The United States respectfully submits that judgment should be granted for the United States, based on the current record, and in the alternative, the Court should exercise its equitable discretion to reopen discovery and conduct a trial on those factors introduced to the Section 5 inquiry in Ashcroft.

[20] Indeed, in those cases in which covered jurisdictions have adopted redistricting plans under which they improperly conducted elections before receiving Section 5 preclearance and sought administrative preclearance after the fact, the Attorney General typically has considered voting patterns in any elections held under such unprecleared plans, in addition to other relevant electoral data.

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2003, I served or caused to be served a copy of the United States' Reply to Georgia's Response to Order to Show Cause by e-mail and facsimile, to the following counsel:

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